IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.1006 of 1998
In
Notice of Motion No.2436 of 1996
In
Suit No.2480 of 1996

Agya Rani Dua,
Hindu Indian Inhabitant of Bombay,
aged 69 years, residing at
C/o.Dr.Amar Singh Gulati,
E/3, Ground Floor, Geeta Society,
10 Synagogue Street, Pune 411 001,
through her Son-in-Law and
Constituted Attorney Lt.Co.Ashok
Thukrai. .. Appellant
(Org.Plaintiff)

Versus

1. Vidyagauri J.Tripathi,

2. Ms Jyoti Jethalal Tripathi,
at present residing at
Flat No.12, Building 24,
1st Floor, Ashish Co-op.
Housing Society Ltd.,
Gurunagar, J.P.Road,
Andheri (West), Mumbai 53. .. Respondents
(Org.Defendants)

--

S/Shri S.U.Kamdar with Ketan Parekh for the Appellant.

Shri Nusrat Shah with Smt.Pervin D.Contractor and S/Shri A.K.Gupta, Alex V. Almeida and Ms Ema P.Almeida i/b Smt. Naazish N.Shah for the Respondents.

--

CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 8TH FEBRUARY, 2007

ORAL JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Heard. The present appeal arises from an order dated 27th August, 1998 passed in Notice of Motion No.2436 of 1996 whereby the learned Single Judge has allowed the notice of motion and rejected under Order VII Rule 11(a) and (d) of the Code of Civil Procedure, 1908 the plaint filed by the appellant in Suit No.2480 of 1996 on the ground that the suit is barred by law of limitation as well as that the plaint does not disclose cause of action.

2. Placing reliance in the decisions in the matters of **Gunwantbhai Mulchand Shah & Ors. v. Anton Elis Farel & Ors.,** reported in JT 2006(3) SC 212, **State of Maharashtra v. Pravin Jethalal Kamdar (Dead) By Lrs.,** reported in (2000)3 SCC 460, **Achal Reddi v. Ramakrishna Reddiar & Ors.,** reported in AIR 1990 SC 553 and **Niranjan Amritlal v. Manharlal Jivanlal Parikh,** reported in AIR 1984 Gujarat 24, the learned advocate for the appellant submitted that the Learned

Single Judge erred in rejecting the plaint on the ground of bar of limitation as well as alleged absence of cause of action when in fact the plaint on the face of it discloses that the suit was very much within the period of limitation as well as that it discloses the cause of action for filing the suit and seeking reliefs prayed for therein. He further submitted that the pleadings in the plaint sufficiently disclose that the appellant was pursuing the matter with due diligence in another civil proceeding against the husband of respondent No.1 and even assuming that there was a delay in approaching the Court, the period spent in pursuing the other civil proceedings is to be excluded from the period of limitation. Besides the relief in the nature of restoration of possession asked for in the plaint is an independent relief and is not a consequential to any other relief asked for in the plaint.

3. The learned advocate appearing for the respondents, on the other hand, submitted that the suit was essentially for specific performance of the agreement dated 21st November, 1984 and therefore in terms of Article 54 of the Limitation Act, Schedule I thereof, a suit was required to be filed within a period of three years from the date of the agreement

and having not so filed, and inspite of being fully aware that the respondents had not paid the amount in terms of the said agreement within the specified period, the suit having not been filed within a period of three years from the date of agreement, no fault could be found with the impugned order holding that the suit has been filed beyond the period of limitation.

4. Perusal of the impugned order discloses that the notice of motion was made absolute in terms of prayer clause (a) thereof. The said prayer was for rejection of the plaint on the ground of bar of limitation as well as on the ground of absence of cause of action. The impugned order does not disclose that the Learned Single Judge has considered the aspect about the absence of cause of action, and the reasoning in support of rejection of the plaint refers to the point of bar of limitation alone. In any case, the notice of motion which was taken out by the respondents apparently discloses that the allegation regarding absence of cause of action was made on the basis of the earlier litigation between the parties and more particularly on the basis of a judgment of the Small Causes Court dated 26th/28th February, 1996 which was sought to be produced along with the notice

of motion. The said judgment did not form part of the plaint and obviously, therefore, there was no occasion for the Learned Single Judge to exercise the jurisdiction under Order VII Rule 11 of the Code in relation to the contention about non-maintainability of the plaint on the ground of failure on the part of the appellant/original plaintiff to disclose a cause of action in the plaint. Therefore, no fault can be found with the impugned order for not considering the said point. Apparently, the final relief which has been granted in the notice of motion in terms of prayer clause (a) thereof has to be construed as having been restricted only to the contention regarding bar of limitation.

5. As regards the point of bar of limitation is concerned, the only ground on which the same was sought to be raised in the notice of motion was that the agreement for sale was dated 21st November, 1984 and the suit was filed beyond the period of 12 years therefrom and therefore, it was barred by limitation. Even in the course of argument, the learned advocate for the respondents submitted that the suit ought to have been filed within a period of three years from the date of agreement and in that regard, attention was sought to be drawn to Article 54 of the Limitation

Act. Plain reading of the said Article 54 of the Limitation Act would disclose that the period of three years prescribed therein for filing the suit for specific performance is to be counted from the date fixed for performance of the agreement, and when no such date is fixed for performance of the agreement, then the date on which the plaintiff gets notice of refusal for performance by the other party to the agreement i.e. defendant. The Apex Court in **Gunwantbhai Mulchand Shah's case (supra)** has clearly held that "in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof."

6. The averments in the plaint and more particularly in paragraph 14 thereof apparently disclose that it was the case of the respondents/original defendants themselves that the agreement dated 21st November, 1984 has not been terminated and is valid and subsisting. Further that the plaintiff, in good faith, was pursuing the earlier litigation in relation to the same premises between the same parties. Since the agreement is still in force and valid, the suit has been filed for various

reliefs including the relief of specific performance of the agreement as also for restoration of possession of the premises. It is not in dispute and it is also stated in the plaint that in the earlier litigation, the appellant had sought eviction of the husband of respondent No.1 on the ground that the respondent was a tenant and the tenancy was terminated. In the said proceedings, the defence was sought to be raised that the husband of respondent No.1 was in possession of the premises on the strength of the agreement for sale dated 21st November, 1984 and in terms of part performance thereof and not as a tenant. The said contention was upheld by the Small Causes Court. Obviously, the appellant will have to be given opportunity to establish her claim for exclusion of the said period spent in pursuing bonafide the other proceedings. Being so, the plaint, on the face of it clearly discloses necessary averments to bring the suit prima facie within the period of limitation, by exclusion of the period in terms of Section 14 of the Limitation Act.

7. The question as to whether the plaintiff has made out a case that he had filed the suit within the period of limitation or not, will have to be decided on the basis of evidence led by the parties and after

framing a issue as regards the bar of limitation. It is well settled law that in case of exercise of the power under Order VII Rule 11 of the Code, the same has to be done solely on the basis of the pleadings in the plaint and not on the basis of the materials which can be produced by the defendant seeking exercise of the power by the Court under the said provisions of law. Since the entire basis for taking out a notice of motion by the respondents was the copy of judgment of the Small Causes Court dated 26th/28th February, 1996 and not with reference to any pleadings in the plaint, in fact, the notice of motion was liable to be rejected in limine.

8. As regards the reference to Article 58 of the Limitation Act pertaining to a relief of declaration, the same cannot be considered independently of Section 14 of the Limitation Act in view of the pleadings in that regard in the plaint. Undoubtedly, to what extent the appellant/plaintiff would succeed in establishing her claim in pursuing another civil proceeding with due diligence is a matter to be decided on the basis of the evidence to be led in that regard by the parties. Whether the appellant had been pursuing another civil proceeding bonafide and such proceeding against the husband of respondent No.1

would fall within the fourcorners of the provisions of Section 14 of the Limitation Act for the purpose of exclusion of such period while calculating the period of limitation for filing the present suit or not, is to be decided on the basis of the evidence to be led by the parties in that regard and proper opportunity will have to be given for that purpose after framing issue in that respect in the suit filed by the plaintiff. It is too premature to express any opinion on that aspect of the matter. The parties need to be permitted to place on record necessary evidence in support of their rival contentions on the said issue.

9. As regards the reference to Article 65, as rightly submitted by the learned advocate for the appellant, the averments in the plaint read with the prayer for restoration of the possession of the premises certainly disclose an independent right to seek relief in the nature of restoration of possession thereof and it is not dependent upon the other reliefs. Besides, on this aspect also, it would be necessary for the Court to appreciate the rival contentions on the basis of the evidence to be led by the parties. In that regard, certain observations by the Apex Court in **Achal Reddi's case (supra)** are to be borne in mind, wherein it has been held thus:-

"We have to consider whether the question of law as to the character of the possession Varada Reddi had between 10-7-1946 and 17-7-1947 is adverse or only permissive. In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the

> other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in case in which there is a mere executor, agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse."

10. Once it is the contention of the respondent No.1 herself that she has been in possession consequent to the agreement for sale entered into between the parties, obviously the possession is in the form of licence granted to her under the agreement and therefore, the period of limitation for restoration would commence from the date of

termination of such licence. What was the date of termination of such licence would obviously be a question to be decided on the face of evidence to be led by the parties and it cannot be decided merely on the basis of prayer being for restoration of possession in a suit and by referring to Article 65 of the Limitation Act. The impugned order nowhere discloses consideration of this aspect of the matter and therefore, the same cannot be sustained and parties are necessarily to be allowed to give opportunity to lead evidence on the point of limitation and the plaint cannot be rejected solely because the same is filed beyond a period of 12 years from the date of the agreement.

11. In case of Article 54 of the Limitation Act even as regards the suit for specific performance, the cause of action would arise from the date fixed for performance of the agreement and in case when no such date is fixed, then it would be from the day the plaintiff is made aware of the fact that the defendant refuses to perform the agreement. In the case in hand, Paragraph 14 of the plaint apparently discloses that no such occasion had arisen for the plaintiff to assume the refusal of performance of the agreement by the defendants/respondents, throughout it was the case

of the respondents themselves that the agreement was not terminated and it subsists and continues in the absence of receipt of any notice of termination of the agreement. In the background of this fact, the contention that the suit ought to have filed within three years from the date of the agreement cannot be accepted. It is true that in the agreement it has been specifically stated that the balance amount was required to paid within a specified period. Further it is also stated in the agreement that in case of failure to pay the balance amount within the specified period, the vendor has to serve a notice upon the vendee to perform his obligation. What is the effect in law of these clauses in the agreement and to what extent they are helpful to ascertain the date of performance of the agreement is to be decided on the basis of the evidence to be led by the parties in that regard.

12. The Apex Court **Pravin Jethalal Kamdar's case (supra)** had clearly upheld the view taken by this Court that the period of 12 years prescribed under Article 65 of the Limtiation Act for a suit for possession based on title would be applicable from the date of possession of the defendant becomes adverse to the plaintiff. Obviously, therefore, the period of

limitation in such cases will have also required to be decided on the basis of the evidence to be led regarding the date disclosed in the plaint as being the cause of action for filing a suit for possession based on title.

13. The Learned Single Judge of Gujarat High Court in **Niranjan Amritlal's case (supra)** also has held that when relief in the nature of possession of the property is a main relief and independent of the relief asked for, the period for filing a suit would govern by Article 65 of the Limitation Act and the suit would not be affected by lesser period of limitation applicable to reliefs claimed together with the main relief for possession of the property.

14. In the circumstances, therefore, the impugned order cannot be sustained and is liable to be set aside and the plaint is required to be restored and the matter is required to be remanded to the Learned Single Judge to proceed with the suit in accordance with the provisions of law.

15. In the result, therefore, the appeal is allowed. The impugned order is quashed and set aside. The plaint is restored to the board. The matter is

remanded to the Learned Single Judge to proceed with the suit in accordance with the provisions of law. No order as to costs.

(R.M.S.KHANDEPARKAR, J)

(DR.DY.CHANDRACHUD, J)